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SAN MARINO

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I. LAND AND PEOPLE

1. The Republic of San Marino is geographically located within Italy, between the provinces of Rimini (Emilia-Romagna) and Pesaro (Marche). Its territory covers an area of 61.19 km^2 on the slopes of Mount Titano and has a perimeter of 39.03 km.

2. Administratively speaking, the territory is divided into nine municipalities (*Castelli*): Acquaviva, Borgo Maggiore, Chiesanuova, Citta' di San Marino (the capital), Domagnano, Faetano, Fiorentino, Montegiardino, Serravalle.

3. Population figures, as of December 2000, reached 26,941. Population density is about 440 inhabitants per km^2. More than 4,000 are citizens of other countries, above all Italians. About 13,000 Sammarinese citizens reside abroad; the largest communities are in the northern regions of the United States, France, Argentina and, of course, Italy.

4. The majority of the population are Roman Catholics.

5. The literacy rate is estimated at 100 per cent. Schooling in San Marino is compulsory up to the age of 16. Younger generations tend to be highly educated: thirty-five per cent complete secondary high school, 8 per cent obtain a university diploma (2000 data). In 1999 per capita expenditure per student was 9,060.35 euros.

6. The San Marino health care and pension systems are of a very high standard. All citizens have free access to health care services and in 1999 per capita health expenditure was 1,880.69 euros.

7. Life expectancy in San Marino is among the highest in the world: 77.4 years for men and 84 years for women. The birth rate is 1.08 per cent and the mortality rate is 0.7 per cent. On average, the population grew by 1.5 per cent annually from 1995 to 2000.

8. The number of households is 11,166 and the average number of members per household is 2.4 people (2000 data).

9. According to statistical data for 2000, the activity rate is 73.1 per cent, of whom 44.4 per cent are employed in the manufacturing sector, 29.5 per cent in trade and services, 25.9 per cent in the public sector and 0.2 per cent in agriculture. The unemployment rate is 2.8 per cent. Tourism is a major source of income with about 3 million visitors a year.

10. In 1999, GDP reached 801,029,815.06 euros. In the same year, real GDP growth was 9.0 per cent. The average inflation rate was 1.6 per cent.

II. GENERAL POLITICAL STRUCTURE

A. Sovereignty

11. The constitutional order of the Republic of San Marino is set forth in articles 2 and 3 of the 1974 Declaration on the Rights of Citizens and Fundamental Principles of the San Marino Constitutional Order (hereinafter the "Declaration on Citizens' Rights"). Article 2 stipulates that the Republic's sovereignty is vested in its people, thus recognizing the fundamental role of citizens' active participation in the life of the country. Such active participation is exercised through the electorate, which is governed by Law No. 6 of 5 January 1996 and is made up of all San Marino citizens of full age who are not affected by temporary or permanent special incapacity due, for example, to bankruptcy, infamous or electoral crimes, disqualification, etc. Voters elect the Great and General Council (Parliament), exhaustively described in another section of this report, have the duty to express their opinion in case of referendum and have the power of legislative initiative.

12. With a view to regulating people's direct sôvereignty, Law No.101 of 28 November 1994 introduced the institution of a referendum in its various forms. Article 3 of Law No. 59 of 8 July 1974 sets forth that the referendum process for the total or partial abrogation of laws, acts and rules, including customary ones with force of law (*referendum abrogativo*), cannot be invoked to suppress bodies, organisms or fundamental powers of the State, as well as the rights and fundamental principles envisaged by the constitutional order. Nor can it concern any subject related to taxes or duties, the State budget, amnesty or pardon, and the ratification of international conventions or treaties.

13. Through another process, voters can propose the guidelines and principles under which a law shall regulate the matter forming the subject of the referendum (*referendum propositivo o di indirizzo*). Without prejudice to the prohibitions concerning those issues limiting the right to vote, the free movement and establishment of people, the violation of human rights and the introduction of principles in conflict with those of the Declaration on Citizens' Rights, this type of referendum can be proposed for the same issues for which the abrogative referendum can be invoked.

14. Another form of referendum enables voters to reject a provision promulgated but not yet in force (*referendum confermativo*). This type of referendum only applies to laws governing the fundamental powers of the State.

15. In all cases, a referendum petition must be subscribed by a number of citizens making up 1.5 per cent of the electorate; the petition, drawn up in a precise, clear and unequivocal manner, shall be submitted by the Promoting Committee to the Captains Regent.

16. Subsequently, an ad hoc Judging Committee establishes in a public hearing fixed by the Committee itself and in the presence of an Opposing Committee, if there is one, whether the petition meets the acceptability requirements. Once the period for the referendum campaign has expired, a petition which has obtained the majority of valid votes cast, and in any case no less than 32 per cent of registered voters, is approved.

17. Under Law No. 101 of 28 November 1994, the electorate has also the faculty to submit to the Great and General Council bills drawn up in articles, accompanied by an explanatory report and indicating the necessary expense coverage. Bills deriving from popular initiative shall be subject to the same debating procedure within the Great and General Council as those introduced by legislatures.

18. The electorate can also exercise the power of petition through an institution called "*istanza d'Arengo*". These petitions, concerning issues of public interest, shall be voted by the parliamentary assembly. Petitions so approved impose on the executive body the obligation to act in conformity with them, so as to comply with the Parliament's will on that specific issue.

B. Captains Regent

19. Article 3 of the Declaration on Citizens' Rights establishes that the Captains Regent (*Capitani Reggenti*) are the heads of State and prescribes the joint nature of this office. The Captains Regent are elected by the Great and General Council from among its own members, who are citizens by origin, for a six-month term. They cannot be re-elected unless three years have passed since the last mandate. In their capacity as heads of State, the Captains Regent represent the national unity and coordinate, preside over and oversee the activity of the most important bodies of the State. The Captains Regent convene and preside over the Great and General Council, establishing the agenda together with the Bureau (*Ufficio di Presidenza*), and issue decrees on particularly urgent matters, with the agreement of the Congress of State. They preside over and coordinate the activity of the Congress of State and, with regard to the judicial bodies, also chair the Council of the XII and the Parliamentary Commission for Justice.

C. Great and General Council

20. The legislative power is entrusted to the Great and General Council (*Consiglio Grande e Generale*), made up of 60 members who are elected by voters every five years (unless the Council loses 51 of its members). The Council also performs a political function par excellence. By virtue of its legislative power, the Council ratifies the decrees issued by the Captains Regent and approves new bills.

21. The power of legislative initiative is entrusted to the Congress of State (*Congresso di Stato*), to the members of the Great and General Council and to the Local Authorities (*Giunte di Castello*). It can also be exercised in the other forms provided for by law.

22. According to the ordinary procedure, a bill, after a first reading, is passed on to the competent Parliamentary Commission which examines and approves each single amendment and the final text before submitting it to the Great and General Council for the second reading.

23. According to an extraordinary procedure, the Great and General Council may also decide, by a two-thirds majority of its members, to examine a bill in a single reading by passing it directly on to the competent Parliamentary Commission. After having examined and approved all articles and amendments, the Commission submits the bill to the Great and General Council for the final vote.

24. In cases of particular urgency, confirmed by two thirds of the secret ballots cast, the Great and General Council may decide, at any stage of the procedure, that a bill be debated and approved by the Council itself in a single reading, including during that very sitting.

25. The political function of the Council takes on concrete form in the appointment of the executive and approval of its programme, in controlling the government activity, through the submission of motions, questions and interpellations, and in the annual approval of the State budget and subsequent adjustments.

26. The Great and General Council also performs administrative and jurisdictional functions (*restitutio in integrum* - a special remedy envisaged against final judgements - amnesty, pardon, acts of grace and rehabilitation.).

D. Congress of State

27. The Congress of State (government body) is vested with the executive power. The 10 Secretaries of State (ministers) making up this body, are appointed by the Great and General Council from among its members. Its appointment follows the approval by the Council of the government programme agreed upon by the groups forming the ruling coalition, upon request of the Captains Regent. Only after the oath is taken by the Secretaries of State does the Congress assume its full powers.

28. The Congress of State, which is appointed at the beginning of the legislature, or whenever necessary because of resignation or other reasons, remains in office for the entire legislative term, except in case of resignation or revocation of its mandate. The meetings of the Government are convened and coordinated by the Captains Regent.

29. The Congress of State determines the Government's general policy, in compliance with the political guidelines of the Great and General Council, to which it is answerable. It also establishes the policy to be adopted in international as well as administrative matters, exercises the power of legislative initiative and gives opinions on the urgency decrees issued by the Captains Regent, and approves the budgets and balance sheets of the State and of the autonomous public companies.

30. Besides the collegial responsibility of this body, each Secretary of State is politically responsible for the administrative sector entrusted to him/her and, in his/her actions, he/she has the duty to comply with the principles of legality, impartiality and efficiency. Each member is civilly liable for any damage caused to the Republic in the fulfilment of his/her functions as a consequence of deceit or gross negligence.

E. The judiciary

31. The organization of the judiciary is dealt with in Part III of this document.

III. GENERAL LEGAL FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS

A. The judicial system

Competent authorities in human rights matters

32. The competent authorities for the safeguard of human rights in the Republic of San Marino are ordinary courts and administrative tribunals. Article 15 of Law No. 59 of 8 July 1974 (annex 1), "Declaration on the Rights of Citizens and Fundamental Principles of the San Marino Constitutional Order", identifies how jurisdiction is attributed by stating that "everyone shall be entitled to jurisdictional protection of subjective rights and legitimate interests before ordinary courts and administrative tribunals". As a consequence, the ordinary judicial authority is competent, on the one hand, to hear and determine all litigations where a person claims the violation of a subjective right by another person, public or private (civil jurisdiction), on the other hand, it is competent to institute and complete any proceedings deriving from the State exercising its punitive power (criminal jurisdiction). Administrative tribunals are competent to deal with all requests by private individuals whose legitimate interests have been damaged by an act of the public administration in contrast with the principles of lawfulness and impartiality.

33. Article 3 of Law No. 59/1974 stipulates that "the judicial bodies established by law shall be fully independent in the fulfilment of their functions", thus recognizing the judiciary's autonomy and independence from the legislative and executive powers.

34. In implementing the above-mentioned constitutional principles, Law No. 83 of 28 October 1992 (annex 2) introduced a reform of the judiciary, by reviewing the structure of ordinary courts and administrative tribunals and changing significantly the status of judges. Articles 1 and 9 of Law No. 83/1992 confirm the monocratic nature of the judiciary, this forming a most basic and therefore traditional principle of the San Marino legal system.

Ordinary courts (civil and criminal jurisdiction)

35. Article 2 of Law No. 83/92 sets forth that ordinary jurisdiction is attributed to the Judge of Appeal, the Law Commissioner, the Conciliating Judge, and the Clerk. More than one judge can be assigned to the Judicial Offices and full jurisdictional functions to each of them are ensured. The composition and attributions of the ordinary jurisdiction are described in the following paragraphs.

36. The Judge of Appeal (*Giudice delle Appellazioni*) decides on any appeal against the decisions made in the first instance by the Law Commissioner. The Judge of Civil Appeal is competent to decide on remedies against civil judgements; the Judge of Criminal Appeal on remedies against criminal judgements. Therefore, the function of the Judge of Appeal only consists of reviewing the decisions made by the Law Commissioner. This office currently includes one Judge of Appeal for civil matters, and two Judges of Appeal for criminal matters.

37. The Law Commissioner (*Commissario della Legge*) performs jurisdictional functions in the court of first instance, both in civil and criminal matters. With regard to civil matters, the judge is responsible for hearing litigations of any nature, except for cases related to movable property the value of which does not exceed Lit 50 million (25,823 euros). The judge performs, moreover, voluntary jurisdictional functions. The Law Commissioner reviews the decisions made by the Conciliating Judge. With regard to criminal matters, the Law Commissioner is vested with investigating functions and makes decisions in the first instance. Article 2 of the Code of Criminal Procedure stipulates that the Law Commissioner is responsible for the conduct of criminal action, while article 24 of Law No. 83/1992 further specifies that judgements shall be made by a Law Commissioner other than the investigating judge in order fully to ensure the impartiality of the former. This office currently has six judges.

38. The Conciliating Judge (*Giudice Conciliatore*) is vested with functions in non-litigation matters, for the purpose of "settling civil disputes of any nature and value, except for cases related to personal capacities and status and any other lawsuit related to non-disposable rights", and in litigation matters involving civil disputes related to movable property the value of which does not exceed Lit 50 million (25,823 euros). In all cases, the settlement of such litigations must be preceded by a conciliation attempt. This office has two judges.

39. The Law Commissioner's Clerk (*Uditore Commissariale*) assists the Law Commissioner in his/her activities. According to article 2 of Law No. 83/1992, the Law Commissioner can delegate or entrust the Clerk with preliminary investigation functions in both civil and criminal matters.

40. The organization of the judicial activity and the attribution of functions where more judges are assigned to the same judicial office are prerogatives of the Chief Judge (*Magistrato Dirigente*) appointed by the Great and General Council for a three-year term from among the judges composing the Civil and Criminal Court (*Tribunale Commissariale Civile e Penale*), pursuant to article 10 of Law No. 83/1992.

41. The San Marino judicial system does not include a Supreme Court to deal with civil and criminal proceedings in the third instance. Further details are provided in section B below illustrating how remedies are regulated, with special reference to civil jurisdiction in the third instance.

Administrative tribunals

42. As far as the administrative jurisdiction is concerned, article 3 of Law No. 83/1992 stipulates that the Judge of Administrative Appeal and the Administrative Judge in the first instance are assigned to this office. Under Law No. 68 of 28 June 1989 (annex 3), they are entrusted with the "jurisdictional protection of interests in respect of the Public Administration" (art. 1), and also perform the functions "set forth by the law with regard to preventive legitimacy controls and complaints about the application of administrative penalties" (art. 2, para. 2).

43. The Administrative Judge in the first instance is competent to decide on petitions "against acts or orders issued by the institutional bodies of the Public Administration ... because

of incompetence, abuse of power or law infringement, when such acts or orders affect a natural or legal person's interests". As a rule, the Administrative Judge has to establish the lawfulness of administrative acts when these are of prejudice to the applicant's legitimate interests. Generally, administrative acts are presumed legitimate as long as these are declared illegitimate by the Administrative Judge. The judge has to examine whether the challenged act is affected by defects of legitimacy, excluding any control on the merit and contents, in conformity with the principle of separation of powers sanctioned in article 3 of Law No. 59 of 8 July 1974, "Declaration on the Rights of Citizens and Fundamental Principles of the San Marino Constitutional Order". In the event the act is unlawful, the judge declares it null and void with retroactive effect.

44. Moreover, the Administrative Judge in the first instance has exclusive jurisdiction over "acts in public employment matters". Since this concerns subjective rights and not legitimate interests, judgements are both on legitimacy and merit. In this connection, article 15, paragraph 3, of Law 68 of 28 June 1989 is worth mentioning: "In proceedings related to public employment [the Administrative Judge] - if the application is accepted - shall condemn the Public Administration to pay the employee's dues, without prejudice to the ordinary judge's competence to order compensation for damages."

45. The Judge of Administrative Appeal is competent to deal with appeals against decisions made by the Administrative Judge in the first instance. In administrative matters, too, there exists no body comparable to a Supreme Court having jurisdiction over challenged judgements made by the Judge of Administrative Appeal (see section B with regard to the third instance).

Appointment and status of judges

46. Judges - except for Conciliating Judges - cannot be San Marino citizens (article 15, para. 2, Declaration on the Rights of Citizens and Fundamental Principles of the San Marino Constitutional Order). This provision is historically justified by the need fully to ensure the impartiality of judges in a country where, because of its tiny size, family ties and friendships are extremely close and frequent.

47. Judges are appointed by the Great and General Council by a two-thirds majority of its members during the first three votes, and by absolute majority from the fourth vote (article 6 of Law No. 83/1992). As regards the Commissioner's Clerk, the Great and General Council takes note of his/her appointment subsequent to a written and oral examination for qualified candidates before a Judging Commission, such commission comprising three magistrates designated by the Parliamentary Commission for Legal Affairs. (article 8 of Law No. 83/1992). Article 8 also stipulates that the Judges of Appeal and the Judge of Administrative Appeal should preferably be chosen from among magistrates, or tenured professors of law, or attorneys with at least 15 years' experience in the practice of law and aged no less than 45, or Law Commissioners and Administrative Judges in the first instance having served for at least 10 years. The same article further stipulates that Law Commissioners and Administrative Judges in the first instance should preferably be designated from among magistrates, or tenured professors of law, or clerks having served for at least eight years, or attorneys with at least six years' experience in the practice of law and aged no less than 30. Conciliating Judges, who can be San Marino citizens, are designated from among the attorneys having been on the roll for at least five years, or from

among clerks having served for at least two years. Lastly, Commissioner's Clerks are chosen from among those having a university degree in law. This provision is clearly aimed at ensuring that only highly qualified technical experts are selected, which is all the more important in a legal system essentially based on open-ended sources of law, rather than a coded set of laws, and characterized by a long-standing cultural and moral tradition.

48. As regards the length of judicial mandates, article 7 of Law No. 83/1992 sets forth that judges are initially appointed for a four-year term, and subsequently confirmed for an open-ended term. Conciliating Judges designated from among San Marino attorneys are appointed for a three-year mandate and can be reappointed for further three-year mandates. This provision is quite innovative in ensuring effective independence of magistrates from high State authorities, because the judge is employed on a permanent basis, thus preventing him/her from being biased or prejudiced in any way for the purpose of being periodically reappointed.

49. In the cases expressly envisaged by the law, jurisdictional functions are also vested in the Great and General Council, responsible for extraordinary remedies like the *restitutio in integrum* and the *querela nullitatis*, and in the Council of XII (*Consiglio dei XII*), court of third instance when the second instance judgement differs from that delivered in the first instance, or when a court relinquishes jurisdiction. In performing such jurisdictional functions both bodies decide after having heard the opinion of an expert in law.

B. Remedies for violations of human rights

50. First of all, the San Marino legal system recognizes and protects both human and political rights. These rights enjoy a threefold protection which can be invoked:

(a) In case of violation by third parties. Such protection is implemented *in primis* by virtue of the criminal action instituted by the judge. As a rule, it is not subject to a request by the injured party, nor is it excluded by virtue of the victim's consent. Secondly, such protection is achieved through civil action, aimed at imposing compensation for damages resulting from the violation of the fundamental right;

(b) Against limitations imposed by the judicial authority. Measures involving deprivation of liberty made by ordinary courts can always be appealed against to another court;

(c) Against limitations by administrative authorities. Fundamental rights are potentially subject to a series of limitations, the actual application of which is often left, by law, to the discretion of the public authority. As a consequence, an unlawful act by the public authority limiting in practice a fundamental right can be of prejudice to a citizen's legitimate interest. To ensure protection from unlawful limitations of fundamental rights, the injured party can appeal to the administrative tribunal.

Here follows a detailed description of the remedies available to ensure protection of fundamental rights in case of violation.

Appeals to the criminal jurisdiction

51. It is worth noting that human rights protection is ensured in San Marino by criminal rules punishing all behaviours constituting violations of such rights. Under the San Marino Criminal Code, in force since 1 January 1975 (annex 4), criminal offences include, inter alia: murder, manslaughter, reckless homicide (arts. 150, 163 and 158), intentional and unintentional personal injuries (arts. 155 and 164), instigating and assisting the commission of suicide (art. 151), enslaving (art. 167), trafficking and trade in slaves (art. 168), abduction (art. 169), violation of sexual freedom (art. 171), private violence (art. 179), arbitrary arrest and failure to release from jail (art. 351), arbitrary treatment of detainees (art. 352), housebreaking (art. 182), arbitrary search of domicile (art. 353), disclosure of correspondence (art. 190), defamation (art. 183), slander (art. 184), libel (art. 185), public defamation of religion (art. 260), violation of religious freedom (art. 261), interference with religious rites (art. 262), attack on the free exercise of the right to vote (art. 394), violation of secret ballot (art. 395), violation of political rights (art. 396), fraud in marriage (art. 223).

52. The provisions of the Criminal Code apply both to San Marino nationals and foreign or stateless people perpetrating offences on the territory of the State (art. 5). With regard to imputability, article 10 of the Criminal Code stipulates that people under 12 years of age cannot be charged with a crime. As for minors over 12 but under 18 (majority is attained in San Marino at the age of 18), the judge "shall impose, where mental capacity is ascertained, a penalty reduced by one or two degrees". A reduced penalty may also be imposed by the judge on any person who, "when committing the crime, was under 21 years of age". Article 1 of Law No. 86 of 11 December 1974, "Rules Implementing the Criminal Code and Reforming Criminal Procedure", stipulates that "in order to ascertain a minor's mental capacity, the minor being over 12 but under 18 and having committed a mischief [intentional offence], the judge shall always order a bio-psychical examination".

53. The protection of the rights referred to in the Criminal Code applies to all people - with no distinction - who suffer an offence on the territory of the State. Any person whose rights have been violated can go to the criminal court to prosecute the offender. It is worth noting that the judicial authority has the obligation to institute the criminal action even in the absence of a complaint as soon as it formally receives a *notitia criminis*, except for those cases expressly envisaged by the law where a complaint by the injured party is a econdition. Article 2 of the Code of Criminal Procedure stipulates that "the criminal action is essentially based on public law, though in some instances it requires a complaint by the injured party to be instituted." The criminal action is conducted ex officio by the Law Commissioner by means of an investigation to find out the truth.

54. The criminal process is regulated by the law and includes all acts aimed at making a jurisdictional decision on the basis of a *notitia criminis*. Basically, it consists of the investigation and public hearing, followed by either the conviction or absolution of the defendant. Criminal jurisdiction, that is the power to settle, by reasoned decision the conflict between the State's punitive law during the trial and the defendant's right to freedom under the criminal rule is vested in the ordinary judicial authority.

Jurisdictional remedies and procedural guarantees for defendants and convicts under the law of criminal procedure

55. San Marino criminal process envisages some procedural guarantees in favour of the defendant, which safeguard the human rights of a person on trial in conformity with the International Covenant on Civil and Political Rights.

56. In this respect, it is worth recalling that the San Marino Code of Criminal Procedure entered into force in 1878 (annex 5) and is therefore of a clearly inquisitorial nature. Subsequent laws, more specifically Law No. 43 of 18 October 1963, Law No. 86 of 11 December 1974 (annex 6) and Law No. 9 of 2 February 1994 (annex 7), have greatly adjusted such procedure to enhance the safeguard and protection of the principles enshrined in the Declaration on Citizens' Rights and in the various international conventions on human rights to which the Republic is a party.

57. Efforts have been made to ensure full protection of the right to defence at any stage of the judicial proceedings, and some measures have been adopted to guarantee the right of convicts to serve the sentence according to the rehabilitative function of punishment. Considering that the general subject matter of a criminal process is the conflict between the subjective right of the State to punish and the right of the individual to freedom, the main concern of the San Marino legislator was to introduce guarantees and remedies for the defendant whose personal liberty has been restricted during the proceedings. Indeed, it is clear that the deprivation of personal liberty prior to a final judgement must be an extraordinary measure to be adopted only under special circumstances.

58. Moreover, it must be noted that an ad hoc Parliamentary Commission is examining and will soon decide on a new Code of Criminal Procedure, which is the result of a long debate on the absolute need to fully review today's system in order to obtain a new criminal process based on accusations. According to this model, prosecuting and investigating functions are entrusted to a prosecutor, while the judge, no longer responsible for collecting evidence, indeed becomes a third party between the prosecutor and the defence counsel. Starting from the inquiry stage, the judge has the duty to control all investigations to guarantee the right to defence and the correctness of the criminal action.

59. After these necessary clarifications, it is useful to illustrate how the rights of the accused are guaranteed in the criminal procedure now in force in San Marino. The investigations conducted by the Law Commissioner performing the criminal investigation functions consist of the diligent and scrupulous search started by the Investigating Judge upon receipt of a *notitia criminis*, in order to establish who committed the offence (article 20 of the Code of Criminal Procedure). The accused shall be interrogated as soon as possible and, in any case, within 24 hours from imprisonment (article 125 of the Code of Criminal Procedure). The interrogation shall be conducted in the presence of an advocate of his/her choosing or of a public defender.

60. As for procedural guarantees of the right to defence, article 13 of Law No. 86 of 11 December 1974 stipulates that:

> "with regard to all acts performed by the judge, the advocates of the parties are entitled during appraisals:
>
> "(1) to receive formal notification of the appointment and questions and to submit observations and further questions by the date fixed for the starting of appraisals:
>
> "(2) to appoint, contextually, an expert of their choosing who is entitled to assist to appraisals and submit oral deductions to the expert appointed ex officio;
>
> "(3) to be present whenever the official expert conducts appraisals before the judge or is heard for clarifications.
>
> "The advocates of the parties have furthermore the right to be present during interviews and confrontations involving the defendant, to attend experiments, judicial accesses, search of people, things and premises. In such case, the judge shall notify the advocates the time and place fixed for these acts by any means and at least 24 hours in advance".

Article 229 of the Code of Criminal Procedure, as amended by Law No. 9 of 2 February 1994, punishes by the terms of nullity any procedural acts performed in violation of the above-illustrated rights. The defendant also has the right, at any stage of the proceedings in the first instance, to obtain the examination of witnesses on his/her behalf and of any evidence that could serve to his/her defence or mitigate his/her punishment (art. 134).

61. Having collected all evidence, if the Investigating Judge concludes that such evidence does not provide legal ground for arraignment, he/she shall transmit the affair to the *Procuratore del Fisco* for an opinion. If the latter is also of the same opinion, the Investigating Judge shall order the dismissal of the case (art. 135). On the contrary, the Investigating Judge shall serve a summons indicating the nature and cause of the charge and informing the defendant of the right to have legal assistance of his/her own choosing or, failing this, to have legal assistance assigned to him/her. The defendant shall have at least 30 days from the notification of the summons to appear in court (art. 175).

62. At the preliminary stage, the Investigating Judge may adopt precautionary measures involving deprivation of liberty. The provisions concerning preventive detention set forth in the Code of Criminal Procedure were significantly amended by Law No. 9 of 2 February 1994. Article 14 of the Law establishes that measures involving deprivation of liberty include preventive detention either in prison or a treatment facility, house arrest, the obligation or prohibition to stay on the territory of the Republic or part of it, the prohibition to expatriate. Nobody can be subject to coercive measures in the absence of adequate evidence leading to believe that the defendant is responsible for the facts for which he/she is being prosecuted and that such facts constitute a crime punishable by the terms of any of these measures. Penalties involving deprivation of liberty are ordered by the judge only if he/she deems there is a risk of withholding of evidence of the defendant's escape, or that the defendant may harm the community. The penalty least affecting the accused and his/her family shall be applied, provided

that it proves to be effective. In any case, the measure must be proportionate to the offence and the corresponding penalty or security measure that would be applicable, taking also into account the possibility for the accused to be released on probation. Such elements must be assessed by the judge in the course of the proceedings.

63. With regard to preventive detention, article 15 of the above-mentioned Law provides that such measure can be ordered in the following cases:

(a) If the crime for which an action is brought is punishable by terms of first-degree imprisonment and if there is a risk of withholding of evidence, misprision of felony, or escape from prosecution;

(b) If the crime for which an action is brought is punishable by the terms of at least second-degree imprisonment and whenever any other measure has proved to be inadequate.

64. The defendant has the right to legal assistance on bail when the reasons which have determined the arrest have ceased to exist. Article 17 of Law No. 9/1994 grants the person deprived of his/her liberty the right to appeal to the Judge of Criminal Appeal. The summons issued by the Investigating Judge concludes the inquiry stage, followed by the starting of full hearing which is public and oral. The judgement shall be rendered by a Law Commissioner different from the one responsible for the inquiry (article 24 of Law No. 83 of 28 October 1992).

65. In the public hearing, witnesses are heard again and subsequently the defendant is invited to defend him/herself (article 178 of the Code of Criminal Procedure). The Investigating Judge does not take part in the hearing, while the accusations are supported by the *Procuratore del Fisco*, who is a San Marino citizen and attorney at law. Article 4 of Law No. 83/1992 includes the *Procuratore del Fisco* among public prosecutors, while article 23 of the same Law specifies that the Office of the *Procuratore del Fisco* will be established in connection with the entry into force of the new Code of Criminal Procedure. The appointment and functions of such body will be largely reviewed with the adoption of the new Code of Criminal Procedure, which - as already mentioned - is being examined for final approval by a Parliamentary Commission appointed by the Great and General Council. Only at that point will the *Procuratore del Fisco* become a real and proper magistrate, who, according to the accusatory model, will act as a public prosecutor.

66. The examination of all witnesses is followed by the closing arguments of the *Procuratore del Fisco* and the counsel. Lastly, the accused is also invited to defend him/herself (article 179 of the Code of Criminal Procedure). Subsequently, the Law Commissioner decides the sentence in camera and then formulates the purview of the sentence which is publicly read in court. The grounds of the decision must be deposited with the registry within 30 days from its publication (art. 181).

67. The convict has the right to challenge the sentence before the Judge of Criminal Appeal, who is competent to judge only on those aspects of the sentence that are appealed against (art. 196). Article 196 of the Code of Criminal Procedure also prohibits the *reformatio in peius*, establishing that when the appeal is filed exclusively by the convict, the judge cannot inflict a more severe punishment or revoke earlier benefits.

68. The sentences rendered by the Judge of Appeal are final and no ordinary remedies are envisaged. Only with a final conviction is the defendant found guilty, in line with article 15, last paragraph of the Declaration on the Citizens' Rights, which stipulates the presumption of innocence. In this regard, article 195 of the Code of Criminal Procedure states that the execution of a sentence is suspended during the terms for filing an appeal, during the appeal and during the proceedings in the second instance.

69. If after a final decision newly discovered facts prove the innocence of the convict, the latter (or his/her heir or close relative) or the *Procuratore del Fisco* may request that the sentence be reviewed by a Judge of Criminal Appeal different from the one who pronounced the second instance decision, as provided for by Law No. 20 of 24 February 2000. Upon receipt of the application for judicial review, the Judge of Criminal Appeal declares it inadmissible by a reasoned order, whenever filed outside the cases envisaged by law, by an unauthorized subject, or not in compliance with the terms and requirements established. Conversely, the Judge declares, according to the procedures provided for the appeal judgement, that the application is admissible, revokes the challenged sentence and makes another decision.

70. In case of judgement default, the Judge of Criminal Appeal can suspend, by reasoned order, the execution of the sentence or security measure and, if appropriate, adopt a precautionary measure.

71. The convict can also submit an application for mercy and pardon to the Great and General Council (article 113 of the Criminal Code). Pardon is an act of grace remitting, completely or partially, the punishment inflicted or commuting it to a different punishment, while mercy is an act remitting or commuting the punishment inflicted on a given convicted person.

72. The execution of criminal judgements has been th oughly amended by Law No. 86 of 11 December 1974 which, by replacing chapter XXIV of the Code of Criminal Procedure, has implemented the principle set forth in article 15, paragraph 4, of the Declaration on Citizens' Rights, stating that humane and rehabilitative punishments shall be inflicted only by judges authorized by law to exercise judicial power and only on the basis of non-retroactive rules.

73. With regard to punishments, it is worth mentioning that San Marino legal system does not envisage the death penalty, abolished many centuries ago, life imprisonment or forced labour. The Criminal Code in force provides for the following punishments, listed hereunder from the most to the least severe:

(a) Imprisonment, to be served in prison, envisages eight degrees and cannot exceed 35 years (art. 81);

(b) Disqualification from public offices, political rights, or a profession or trade envisages four degrees and prevents the convict from exercising such rights for a maximum period of five years (art. 82);

(c) Arrest, to be served at the convict's home, under the terms specified by the judge, and account being taken of the convict's working and family needs, or in prison during holidays or other days until the full service of the sentence. Three degrees and a maximum duration of three months are envisaged (art. 83);

(d) A fine in lire, ranging from a minimum of 201,000 lire (103.81 euros) to a maximum of 3 million lire (1,549.37 euros) (art. 84);

(e) A fine in days, whereby the amount to be paid is fixed by the law with reference to a given number of days. The judge is responsible for determining, case by case, the amount of money corresponding to a day of fine, on the basis of the money the convict can save every day, living parsimoniously and fulfilling his/her family maintenance obligations (art. 85);

(f) Reprimand, a severe reproof addressed by the judge in public hearing according to convict's conditions and the seriousness of the offence (art. 86).

74. With a view to guaranteeing the rehabilitation of offenders, articles 5 and 6 of Law No. 9 of 2 February 1994 have introduced in the Criminal Code the possibility for a person condemned respectively to a maximum of two or three years of imprisonment to be put on probation under the supervision of the social services or to be placed under house arrest. The judge for the execution of criminal judgements may decide to put a convict on probation under the supervision of the social services for a period corresponding to the sentence to be served whenever he/she deems that such measure can contribute to the rehabilitation of the offender and there is no risk that he/she will commit other offences (art. 5). Drug or alcohol addicts undergoing or wishing to undergo a rehabilitation programme may request at any time to be put on probation under the supervision of the social services in order to continue or start treatment on the basis of a programme agreed upon with the Social Assistance Board (art. 5). If probation is successful, the sentence or any other criminal effect shall be considered to have been served. Failing the application of this measure, the condemned person may request to serve the sentence at home, in another place of residence, or in a public institution for treatment and assistance. House arrest can be granted if the offender is not considered a socially dangerous person and only in the presence of well-grounded health, study or working needs. Moreover, such measure is mandatory in the following cases:

(a) Women who are pregnant, breastfeeding or having children under 3 years old living with them;

(b) People affected by severe physical or mental disabilities;

(c) Invalid or semi-invalid people over 65 years of age.

Moreover, the judge for the execution of criminal judgements may authorize the convict to leave the place of detention during the day for the time strictly necessary to meet his/her basic needs, if he/she cannot do otherwise, or to perform a working activity indispensable for his/her personal and family maintenance (art. 5).

75. The functions of the judge for the execution of criminal judgements are attributed to the Law Commissioner. All measures taken by the judge for the execution of criminal judgements can be appealed against either by the *Procutarore del Fisco* or the convict, or any interested party. Complaints are decided in the first instance by the judge for the execution of criminal judgements and in the second instance by the Judge of Criminal Appeal, to whom the application shall be filed within 10 days from notification of the measure by the judge for the execution of criminal judgements. A complaint does not suspend the execution. The convict's right to defence is guaranteed and the entire proceedings are based on the principle whereby the parties are treated with equality and are given a full opportunity to present their case at any stage of the proceedings (cf. articles 203 ter and 203 quater of the Code of Criminal Procedure of the text introduced by article 21 of Law No. 86 of 11 December 1974).

Appeals to the civil jurisdiction

76. As stated in our remarks in section A, the Declaration on Citizens' Rights guarantees the jurisdictional protection of subjective rights. Besides criminal jurisdiction, ordinary judicial authorities also have civil jurisdiction, and are therefore responsible for safeguarding the rights of private individuals. The jurisdictional protection of rights consists in the remedies to prevent or eliminate the effects of any violation of or injury to such rights, and represents a means to exercise substantial rights. The judge, as third and therefore impartial party, has the responsibility to settle litigations between two or more parties in respect of a right. Therefore, the civil process is commenced upon a request for protection by a party claiming that his/her rights have been violated by another party.

77. Jurisdictional protection is guaranteed both to citizens and foreigners, without any discrimination. Paragraph 113, Title VII, Book II, of *Leges Statuae Reipublicae Sancti Marini* provides for the "*cautio iudicatum solvi in casum succumbentiae*", as a condition enabling foreigners to start a civil action before San Marino judicial authorities. This *cautio* consisted in the presentation of a guarantor ensuring the fulfilment of any obligations deriving from the judgement. Italian citizens were expressly exempted from such obligation by virtue of article 11 of the Friendship and Good-Neighbourhood Convention signed on 31 March 1939 between San Marino and Italy and stating that "the citizens of both States may invoke their rights and interests before the judicial authorities of the other State at the same conditions applying to nationals". Moreover, the lack of such *cautio* could not be ascertained ex officio and even the Statutes provided that in the absence of a guarantor foreigners could take an oath. However, the

obligation concerning this *cautio* has fallen into disuse and, in any case, is no longer applicable, since it is in contrast with article 15 of the Declaration on Citizens' Rights and with the conventions on human rights to which the Republic of San Marino is a party.

78. In San Marino, the civil process is based on statutory rules (in particular Law No. 55 of 17 June 1994, annex 9) and customary laws. Such written proceedings are governed by the principles of equality of the parties, public hearing and impartiality of the judge, who is responsible for directing the course of proceedings, but has no power to act ex officio. The power to determine the subject matter of the proceeding in a way binding on the judge is entrusted to the applicant, who shall state or advance, in the petition itself, the facts constituting or injuring his/her rights, except for any juridical qualification of the facts. The litigants are then required to provide the judge with the evidence supporting their applications; the civil judge has in any case the power to autonomously collect or supplement the evidence submitted by the parties. Having established the right and that the same has been injured by the adverse party, and having applied the relevant legal provisions, the judge shall either order the adverse party to compensate the damages sustained by the injured party, to fulfil pending obligations or, more generally, enact the provisions requested by the parties and provided for by law in relation to the different offences envisaged. The San Marino legal system does not provide for detention in case of non-fulfilment of contractual obligations.

79. Worth mentioning is the fact that in San Marino neither private law nor law of civil procedure has ever been codified. As a consequence, there is no Civil Code nor a Code of Civil Procedure. The system of the sources of law, exhaustively illustrated in section C, rests upon the juxtaposition between *ius proprium* - i.e. the medieval statutes and all subsequent reforms by the Great and General Council (laws) - and *ius commune* - i.e. the Roman-canon law, as elaborated over the centuries and applicable only when a specific subject matter is not regulated by law. This clarification is fundamental in that both private law and law of civil procedure are not completely regulated by statutory rules (intended as acts of Parliament). Therefore, many institutions are regulated by *ius commune*.

80. A party claiming that his/her rights have been injured may start a civil action against the injuring party in order to be compensated for the loss sustained. In such cases, the civil jurisdictional protection can flank the criminal one. Any act against life, physical integrity, honour, reputation, personal freedom and confidentiality of correspondence, etc. besides constituting offences in themselves, also enable the injured party or his/her heirs to claim and obtain compensation by the offender for the moral or material damage sustained, so that the injured party or his/her heirs be restored to their former position. In this connection, article 1 of the Code of Criminal Procedure reads: "Any offence shall determine a criminal action; a civil action can also be filed whenever an offence causes a physical or moral damage to the plaintiff. Such civil action can be brought by anyone who has an interest in the compensation of the damage".

81. Also, San Marino family law provides for civil action with regard to the protection of the rights of spouses and children. Law No. 49 of 26 April 1986 (annex 10) guarantees full equality of spouses (art. 1), and establishes that consent is fundamental to a valid marriage, in the absence of which article 132 grants spouses the right to start a legal proceedings to obtain a decree of

nullity of marriage. In case of legal separation or subsequent divorce, the economically weaker spouse has the right to obtain spousal support (arts. 117 and 128). The law guarantees the protection of children's rights to support, upbringing and education also after dissolution of marriage (arts. 113 and 129). The judge shall establish the amount to be paid for child support by the parent who has not been awarded the custody of the child, as well as for the maintenance of the economically weaker spouse, and specify all measures necessary to ensure the fulfilment of such obligations (arts. 120 and 130). Even after separation or divorce, the interested party may always turn to the judge to have his/her maintenance rights respected (arts. 122 and 131).

82. Law No. 23 of 11 March 1981 (annex 11) safeguards workers' union rights through a series of provisions protecting trade union activities. In this connection, article 10 establishes that if an employer behaves in such a way as to prevent or limit trade union activity, upon request of the interested legally recognized trade unions the Law Commissioner, in his/her capacity as Magistrate for Labour, after having summoned the parties and collected some general information, shall order the employer, in the five following days, by reasoned and immediately enforceable decree, to stop his/her unlawful behaviour and remove all relevant effects. Such order may be appealed against, within 15 days from the date of its notification to the parties, to the Judge of Civil Appeal, in his/her capacity as Appeal Magistrate for Labour (article 20 of Law No. 83 of 28 October 1992), whose decision shall be final. The appeal shall not suspend the effects and the enforcement of the order issued by the Magistrate for Labour.

83. It must be underlined that the examples mentioned above do not offer an exhaustive description of all cases in which one can bring civil action for the protection of human rights.

84. The Law Commissioner is the jurisdictional body of first instance in civil matters. However, lawsuits concerning movables the value of which does not exceed 50 million lire (25,822.84 euros) fall within the competence of the Conciliating Judge. The decisions of the Conciliating Judge can be appealed against to the Law Commissioner; first instance decisions of the Law Commissioner can be appealed against to the Judge of Civil Appeal.

85. The San Marino legal system provides that, in order to be final, civil judgements must meet the so called "*doppia conforme*" requirement (two concordant decisions). This means that, in case of appeal against a first instance judgement, two concordant judgements must have been rendered for the matter to be considered *res judicata*. According to this principle, if the second instance judgement coincides with that of first instance, no other appeal is allowed and the matter is *res judicata*. On the contrary, if the second instance judgement differs from that of first instance, and the other party does not agree with the judgement, a third instance judgement may be requested from the Council of the XII (article 5 of Law No. 83 of 28 October 1992), which, having heard the opinion of a legal expert appointed among jurists of recognized competence, shall confirm either the first instance or the appeal decision. The judgement confirmed by the Council of the XII, be it the first instance or the appeal decision, is *res judicata*. In practice, the decision of the Council of the XII can be considered more as a vote, rather than a judgement, by virtue of which one of the two judgements is executed.

86. Possible remedies against final judgements are the "*querela nullitatis*" and the "*restitutio in integrum*", falling within the competence of the Great and General Council which, in rendering its decision, avails itself of an expert appointed among jurists of recognized

competence. The *querela nullitatis* is invoked against a judgement affected by a defect of legitimacy, though the full hearing occurred in accordance with the relevant legislation. As a consequence, only the judgement shall be reviewed. The *restitutio in integrum*, conversely, is invoked not against the judgement but the whole judicial proceedings because affected by defects of merit from the full hearing stage. Hence, the trial has to start again.

87. Law No. 81 of 14 June 1995 (annex 12), in implementing the provision in article 5 of Law No. 83 of 28 October 1992, reformed the procedure concerning such extraordinary remedies. Article 9, in particular, establishes that, with regard to *restitutio in integrum* and *querela nullitatis* cases, the rendering of the necessary opinion is entrusted to an expert appointed by the Great and General Council by a two-thirds majority at the beginning and for the whole duration of the legislature. Article 7 sets forth that the Great and General Council, without any voting, shall take note and decide in conformity with the opinion of the jurist. The purpose of this procedure is to prevent the Great and General Council from expressing a political vote, thus confirming the jurisdictional nature of such decisions. The Parliament, indeed, by simply taking note of the jurist's opinion, does not express any political vote, but rather gives the opinion the force of a sentence.

Appeals to the administrative jurisdiction

88. As illustrated in section A, the protection of the legitimate interests of private individuals against any illegal act perpetrated by the Public Administration is entrusted to administrative tribunals. In section A also the scope of such protection has been described. In practice, anyone who believes that his/her interests have been damaged by an administrative act can appeal to the competent body to obtain the annulment of such act. This occurs when the Public Administration violates the laws governing its activity, thus injuring the interests of the individuals affected by such act. Indeed, the legal system protects the interests of private individuals so that the Public Administration exercises, in conformity with the law, those powers affecting the legitimate interests considered as relevant by the system itself. In such cases, the direct subject of protection is not the relevant subjective position with which the administrative act interferes; in fact, the direct subject is the interest of the private individual that administrative power be exercised in compliance with the rules on administrative acts, as set forth in the legal system.

89. The relevance of the administrative jurisdiction in the context of human rights protection can be inferred from the fact that the annulment of an illegitimate administrative act, following a regular judgement by the Administrative Judge, besides removing, on a retroactive basis, the effects of any acts injuring the citizens' rights, is often the precondition for a private individual to bring a civil action to ordinary courts, in order to obtain compensation for damage. The competence of an ordinary judge to hear and determine the effects of an illegitimate administrative act injuring the rights of an individual rests upon the condition that the administrative act be declared illegitimate; this then becomes a fact which may cause a damage and which shall be decided upon by the ordinary judge.

90. Article 15, paragraph 3, of Law No. 68 of 28 June 1989 expressly stipulates the distribution of competence with regard to public employment relations, stating that: "In proceedings concerning public employment [the Administrative Judge], if the application is accepted, shall also sentence the Public Administration to pay the employee the amount due, without prejudice to the competence of the ordinary judge to decide over a possible compensation for the damage". Indeed, the administrative act could damage the principle of equality of citizens, cause discrimination, and limit or inhibit the exercise of their rights and fundamental freedoms. Therefore, the individual damaged by the illegitimate act of the Public Administration has the right to take legal action in order to obtain the annulment of such illegitimate act. The judgements of the Administrative Judge of first instance may be appealed against to the Administrative Judge of Appeal, as the "*doppia conforme*" principle also applies to administrative jurisdiction (see paragraph 85 above).

Compensation and rehabilitation systems for individuals who have suffered human rights violations

91. Article 15 of Law No. 83 of 28 October 1992 introduced in the San Marino legal system the civil liability of magistrates in order to sanction any intentional or unintentional behaviour of judges who - in the fulfilment of their jurisdictional functions - have damaged private individuals' rights. According to this article, "anyone who has suffered damage deriving from a judicial measure taken by the ordinary or administrative magistrate intentionally, out of gross negligence or a failure of justice, may bring an action against the State to obtain compensation for material and moral damages deriving from the unjust deprivation of personal freedom". In the fulfilment of his/her judicial functions, the magistrate cannot be held liable for the interpretation of law provisions, nor for the examination of facts and evidence.

92. A failure of justice occurs when the magistrate omits to fulfil the duties of his/her office, or does so with delay, and when, the term established by law for the fulfilment of such duties having expired, the party has filed a petition to obtain a pronouncement by the judge and 60 days from the date of deposit of the petition with the registry have passed without any justification. In any case, in the absence of a legal time limit, 90 days must pass from the date of deposit of the petition with the registry for the obtaining of the pronouncement.

93. Gross negligence occurs in the following cases:

(a) Gross violation of law caused by inexcusable negligence;

(b) The affirmation, caused by inexcusable negligence, of a fact the existence of which is indisputably excluded from the records of the proceedings;

(c) The negation, caused by inexcusable negligence, of a fact the existence of which is indisputably evident from the records of the proceedings;

(d) The adoption of a measure affecting personal freedom outside the cases envisaged by law or without any reason.

94. The request for compensation shall be addressed to the Government Syndics (representing the State) within a year following the final judgement relative to the proceedings in which the damage has been ascertained. The initial request shall be deposited with the civil registry of the court. Within a year following the payment of the compensation, the State shall ask the magistrate responsible for the measure or the violation having caused the damage to reimburse the sum paid. The magistrate who has taken a measure for which an action has been instituted can intervene at any stage of the proceedings. The decision pronounced at the end of the proceedings started against the State does not affect the proceedings instituted by the State against the judge if the judge has not voluntarily intervened in the proceedings.

95. At the beginning of each legislature, the Great and General Council shall appoint a foreign magistrate to carry out all preliminary investigations and pronounce the final decision in all responsibility proceedings, to which ordinary procedure shall apply. The sentence rendered by the judge making the decision can be appealed against to the Court of Appeal, i.e. the foreign magistrate appointed by the Great and General Council at the beginning of every legislature in accordance with the provisions in articles 6 and 8, who shall act in conformity with the ordinary procedure envisaged for civil appeals. The decision shall be transmitted to the Great and General Council which shall take note of it.

96. Such discipline is the "break-even point" between the need to make the judge aware of his/her responsibility, including material liability for any loss sustained by an individual because of his/her culpable behaviour, whether negligent or wilful, and the need to avoid the proceedings being distorted because of the defensive attitude of the judge.

97. To sum up, the objectives of such discipline are: to guarantee, on the one hand, the compensation for damages unjustly sustained by private individuals due to the unlawful behaviour of a magistrate (by bringing an action against the State) and, on the other hand, to avoid compromising the delicate function of the judge - guaranteed by the principles of autonomy and independence - by unfounded claims for compensation.

98. The above-mentioned principles governing the civil liability of magistrates can, therefore, be summarized in five fundamental points:

(a) The applicability of these provisions both to ordinary and administrative jurisdictions;

(b) The fact that the magistrate cannot be directly sued by the injured party who, on the contrary, is requested to bring an action against the State, after all judicial remedies have been exhausted in the action during which the damaging measure was adopted;

(c) The definition and rigorous application of standards of "gross negligence"; according to the law, gross negligence consists, first of all, in the non-application of a law in force or in the application of an abrogated or revoked rule, as well as in the adoption of measures not contemplated by law, taking note that the seriousness of the infringement is commensurate to the seriousness of its effects. The law also covers the distortion of facts by inexcusable

negligence and the adoption of measures affecting personal freedom outside the cases provided for by law or in the absence of any reason. Lastly, the law precisely defines the scope of liability in case of failure of justice;

(d) The lack of liability for the activity related to the free decision-making of the judge. Indeed, in order to guarantee an objective fulfilment of the jurisdictional functions, the magistrate cannot be held liable for the interpretation of law provisions and for the establishment of facts and evidence. The judge's activities excluded from civil liability refer to the stage when the judge formulates his/her decision, as expressly guaranteed by the Declaration on Citizens' Rights;

(e) The establishment of jurisdictional bodies different from ordinary ones, appointed by the Great and General Council for the entire life of the legislature, with the aim of ensuring the impartiality of judgements and to dispel any doubt about decisions having been inspired by corporate favour.

99. By acceding to the Council of Europe, the Republic of San Marino has also become a party to the European Convention on Human Rights. As a consequence, the respect for human rights by San Marino authorities is also guaranteed by the possibility granted to any injured party to bring his/her case to the European Court of Human Rights.

C. System of the sources of law

The protection of human rights in the Declaration on Citizens' Rights

100. The rights enshrined in the various international instruments on human rights are safeguarded in San Marino by Law No. 59 of 8 July 1974, "Declaration on Citizens' Rights and Fundamental Principles of the San Marino Constitutional Order". The constitutional nature of these principles and the special procedure envisaged for their review make the Declaration a primary source of law. Article 6, paragraph 1, sets forth that "the provisions contained in this Declaration may be reviewed by the Great and General Council only by a two-thirds majority of its components".

101. In particular, the Declaration on the Citizens' Rights recognizes and guarantees the following rights:

> Article 4 - Everyone is equal before the law, without distinction on grounds of personal, economic, social, political or religious status. All citizens are granted access to public offices and to elective posts, under the terms established by law;
>
> Article 5 - Human rights are inviolable;
>
> Article 6 - All civil and political freedoms, including personal freedom, freedom of residence, establishment and expatriation, of assembly and association, of thought, conscience and religion, the confidentiality of any form of communication, freedom of art, science and teaching, and the right to free education;

Article 7 - The right to vote and be elected by universal, direct and secret suffrage;

Article 8 - The right to form, in a democratic way, political parties and trade unions;

Article 12 - Protection of the family, based on the moral and legal equality of spouses;

Article 15 - Jurisdictional protection of subjective rights and legitimate interests. The right to defence at any stage of judicial proceedings. Humane and rehabilitative sentences shall be pronounced only by judges authorized by law to exercise judicial power and according to non-retroactive laws. The accused shall be presumed innocent until proven guilty.

Sources of San Marino law

102. To better understand the position of this constitutional charter in the hierarchy of laws, it is useful to consider the sources of the San Marino legal system. The distinctive feature of the San Marino legal system lies in the lack of codification of private law, which so preserves, exclusively as regards civil law, commercial law and law of civil procedure, the system of common law sources typical of European systems prior to the French codification in 1804.

103. On the contrary, in obedience to the principle of lawfulness, the Republic has a Criminal Code and a Code of Criminal Procedure. Therefore, under San Marino legal system, criminal rules can be introduced only by statutory provisions. In this regard, article 1 of the Criminal Code - implementing article 15 of the Declaration on Citizens' Rights - stipulates that "no one shall be convicted for an act which does not constitute an offence under the law, nor shall a penalty be imposed other than those expressly provided for. No one shall be subjected to security measures other than those expressly provided for by law, and only in specified cases." Analogy is expressly prohibited by article 2 which sets forth that "in exercising his/her jurisdictional power, the judge shall not go beyond the interpretation of the law in relation to the case examined, nor can he/she issue decisions of a general nature. His/her sentences shall not be binding on other cases".

104. Again with respect for the principle of lawfulness, article 3 stipulates the principle of non-retroactivity of criminal laws. It is indisputable that the principle of lawfulness is a fundamental achievement of civilized nations, in that it safeguards citizens' freedoms from possible abuses by the State powers. First of all, it entails a law requirement which, under the rule of law, represents a crucial guarantee. By virtue of this principle, only the Great and General Council, as the body representing the people's sovereignty, can determine what behaviours have to be criminalized, account being taken of the incidence of the criminal process on the fundamental rights and freedoms of citizens. The non-retroactivity principle prohibits the application of criminal law to acts committed before its entry into force, with a view to preventing the infliction of penalties heavier than those applicable at the time the criminal offence was committed. Lastly, the principle of lawfulness, in postulating that criminal offences must be expressly covered by law, prohibits the application of a law to similar facts which, literally, are not covered by it.

105. Similarly, any administrative act limiting the rights and fundamental freedoms of citizens must be contained in law, that is to say an act of Parliament. In this regard, article 6 of the Declaration on Citizens' Rights stipulates that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law, while article 14 of the Declaration states that the public administration shall ensure that its activity conforms to the criteria of lawfulness, impartiality and efficiency.

106. In addition to the above introduction, which clarifies that the following analysis only refers to private law, it is important to stress that the sources of law are listed in Book I, sections XIII and XXXI of the *Leges Statuae Reipublicae Sancti Marini*, dating back to the seventeenth century and clearly indicating the hierarchy of the sources: statutes, statutory laws, customary laws and *ius commune*. Therefore, in the San Marino legal system, the statutes, the laws passed by the Great and General Council, customary laws and *ius commune*, the last being a subordinate and supplementary source, make up a system governed by Law No. 59 of 8 July 1974 which is the "Declaration on Citizens' Rights and Fundamental Principles of the San Marino Constitutional Order".

107. *Ius commune*, as a subordinate source, is applicable only in the absence of statutory or customary laws governing a specific subject matter. In this connection, it must be underlined that the *ius commune* in force in the Republic of San Marino "is not the Roman law under Emperor Justinian, but rather the law which developed in the most civilized states of Europe and, in particular, in Italy on the basis of the Roman and canon law and on custom and usage, and to which the works of most distinguished jurists and the decisions of well-known Tribunals refer. ... common mercantile law forms part of the general common law" (judgement by Professor Scialoja, Judge of Civil Appeal, 12 August 1924, *Giur. Samm.*, 1924, p.18).

108. Relations between *ius commune* (Roman-canon law) and *jus proprium* (statutory laws) have been clearly explained and summarized in case law, which reads: "It must be remembered that *ius commune* is the ancient *lex omnium generalis*, the system elaborated over the centuries by case law on the basis of Roman law under Emperor Justinian, of canon law as well as custom and usage, while *ius novum*, represented by statutory laws and subsequent local legislation, is not at all a full codification of private, civil, commercial, and civil procedure law. Therefore, the expression 'subsidiary law' must not be misinterpreted by supposing that *ius commune* can be applied only under exceptional circumstances, in case of loopholes in the statutes or local laws, as if these were general legislation of the Republic of San Marino. In fact, *ius commune* is the rule and local legislation the exception, as evidenced by the quantitative ratio between the relevant rules and, most significantly, by the integrating, modifying and innovative special nature of local legislation vis-à-vis the general discipline of juridical institutions exemplarily provided by *ius commune* and always highly regarded by San Marino legislator" (judgement by Professor Guido Astuti, Judge of Civil Appeal, 30 July 1963, *Giur. Samm.*, 1965, file 1, p. 26 s.).

109. Between *ius proprium* and *ius commune* are the *laudabiles consuetudines*, i.e. the principles elaborated by case law with the course of time. Such case law principles have gradually supplemented San Marino legal system, adapting legislation to changing social and economic conditions and guaranteeing the fundamental rights enshrined in the Declaration on Citizens' Rights.

110. As already stated, all these sources were brought together to form a system by Law No. 59 of 8 July 1974, the principles of which "must be respected by judges ... while interpreting and enforcing the law" (art. 16). As mentioned, the Declaration on Citizens' Rights and Fundamental Principles of San Marino the Constitutional Order (Law No. 59 of 8 July 1974) is the constitution of San Marino which sanctioned the general principles of liberty, equality and democracy already inherent in the system. In stipulating that judges shall interpret and enforce the law in conformity with its principles (art. 16, para. 2), the Declaration sanctions the inapplicability of unconstitutional rules.

111. As a consequence, statutory laws constitute special law of strict interpretation, *ius commune* being applicable when a given subject matter is not expressly regulated by positive law. Therefore, statutory and customary laws are a primary and always prevailing source, which can totally or partially repeal *ius commune* provisions. Such relation between primary and secondary sources of law necessarily influences interpretation, leading to the exclusion of use of analogy also in the field of private law. Because positive rules are of a special and derogatory, as opposed to general, nature, the interpreter cannot go beyond the *ratio* of the rule to apply it to a case not contemplated by law.

Constitutional legitimacy verification procedure

112. Despite the peremptory obligation of judges to comply with the principles sanctioned in the Declaration on Citizens' Rights, the constitutional legislator also envisaged the procedure for the verification of constitutional legitimacy, establishing that "whenever the legitimacy of a rule is doubtful or controversial, the judge may request the Great and General Council to express itself on the matter, after having heard the opinion of experts" (art. 16, para. 2). In implementing such provision, Law No. 4 of 19 January 1989 (annex 14) regulated the procedure for the verification of constitutional legitimacy of ordinary rules.

113. Article 2 of Law No. 4 of 19 January 1989 reads: "During proceedings before either an ordinary court or an administrative tribunal, any of the parties, the *Procuratore del Fisco* or the judge him/herself may request in writing the verification of the legitimacy of a rule in relation to the principles contained in Law No. 59 of 8 July 1974. The request shall clearly indicate:

(a) The laws or provisions having the force of law the legitimacy of which is doubtful or controversial;

(b) The provisions and principles of Law No. 59 allegedly violated".

114. Article 3 stipulates that "the judge shall formally reject the requests submitted by the parties or the *Procuratore del Fisco* which are evidently groundless or simply dilatory", by entrusting to the judge before whom the case in which the legitimacy request is pending with the receivability assessment. Therefore, a request to verify the legitimacy of an ordinary rule in relation to the principles sanctioned in Law No. 59 of 8 July 1974 determines an incidental and autonomous proceeding made up of two stages:

(a) Firstly and necessarily, before a *Judex a quo* in order to establish the receivability of the request and that the same is not evidently groundless, either formally or substantially;

(b) Consequently, if the request is receivable, the Great and General Council shall decide on the matter after having heard the opinion of a jurist pursuant to article 4 of Law 4/1989, appointed by the Council for the entire duration of the legislature.

115. Article 8 states that " the rule declared illegitimate by the Great and General Council shall be annulled from the date on which its illegitimacy was declared".

Derogations envisaged by the Declaration on Citizens' Rights

116. The only derogation envisaged by the Declaration on Citizens' Rights is contained in article 6, which reads:

> "Everybody shall enjoy civil and political freedoms. In particular, everyone shall be entitled to personal freedom, freedom of residence, establishment and expatriation, freedom of assembly and association, freedom of thought, conscience and religion. The privacy of any form of communication shall be protected.
>
> "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary for the protection of public order and general welfare".

117. Hereunder are listed the law provisions limiting the above-mentioned rights for serious reasons of public order and interest.

Right to personal freedom

118. This right protects citizens from unlawful acts committed by public authorities against personal freedom. In the San Marino legal system, limitations to personal freedom are precautionary measures involving deprivation of liberty referred to in articles 53 and 54 of the Code of Criminal Procedure in the text replaced by articles 14 and 15 of Law No. 9 of 2 February 1994.

119. These provisions, described in section B, limit the scope of application of such measures by preventing, on the one hand, their infliction as a sort of sanction "in advance" and, on the other hand, striking a balance between the defendant's right to freedom and the community's need for protection. Preconditions are their lawfulness and their absolute necessity under special circumstances. In any case, such measures shall be proportionate to the offence or the sanction that would apply, and be based on adequate evidence. The law also provides for measures alternative to preventive detention. Release on probation is in any case an exceptional measure, because the application of such measure was envisaged by the legislator to protect the defendant's rights.

120. All measures limiting personal freedom must be reasoned and, as already explained, can be appealed against before the Judge of Criminal Appeal. The public order and interest reasons which, under exceptional circumstances, can involve limitations to personal freedom include persons being stopped and held by the judicial police. In this respect, Law No. 20 of 24 February 2000 recognized - in cases where preventive detention is applicable - the possibility of arresting anyone in the act of committing an offence punishable with imprisonment, having regard to the individual's rights. This possibility becomes an obligation in case of offences punishable with at least third-degree imprisonment.

121. Besides these cases, the police can stop and hold people suspected of a crime punishable with imprisonment whenever there is a risk of escape, for investigation reasons, or on security grounds. The police shall draw up a report and notify the interested party and his/her counsel. Stop and arrest reports shall be transmitted to the Law Commissioner within 48 hours. Within the following 96 hours, the Law Commissioner shall either order the release of the person or adopt one of the security measures envisaged by the Code of Criminal Procedure. Failure to comply with the above terms causes the measure to become without effect.

122. With regard to the duty to cooperate with the judicial authorities, the law provides for the police to coercively accompany witnesses, on order of the judicial authority. In civil matters, article 2, subparagraph 3.1, of Law No. 55 of 17 June 1994 states: "If the witness does not appear in court for his/her examination, the judge shall fix ex officio another hearing within the two following months; if the witness fails again to appear before the court without a well-grounded reason, the judge - without prejudice to the application of the sanctions envisaged by law - may order, upon request of a party, that the witness be coercively accompanied by the police before the judicial authority." Article 380 of the Criminal Code punishes witnesses who refuse to appear in court or to swear, or who fraudulently obtain an exemption from deposition.

Right to freedom of residence

123. The right to freedom of residence safeguards the special interests of individuals in preventing any intrusion in their private dwellings. To this end, it should be noted that the definition of residence does not coincide with that referred to in San Marino in civil matters, according to which residence is the place chosen by an individual as the centre (*domicilium*) of his/her interests and characterized by two elements: (a) the regular stay in a given place; (b) and the *animus*, i.e. the individual's will to fix and maintain his/her domicile in that place. Indeed, the constitutional protection covers not only residence as defined above, but also any private dwelling, even temporary, where an individual carries out his/her activity.

124. Derogations from this right are permitted by the rules on inspections, searches and seizures. To this end, article 74 of the Code of Criminal Procedure stipulates that any search in the house of the accused or of any other person must be ordered by the Investigating Judge in charge of the proceedings. The search warrant shall indicate all precautions to be observed and for which the chief of the police is responsible. The seizure of the corpus delicti must be ordered by the Investigating Judge. Article 18 of Law No. 9 of 2 February 1994 establishes that "in case of need and urgency, the police forces may seize the corpus delicti and any other related object, and shall formally report to the Law Commissioner within 48 hours, who, if circumstances so

require, shall confirm the measure within the following 96 hours. Failing such confirmation, the measure shall expire". All coercive measures involving the property of an individual related to seizures or their confirmation can be appealed against by the accused before the Judge of Criminal Appeal (article 17 of Law No. 9/94).

Right to freedom of establishment and expatriation

125. This fundamental right includes three main freedoms:

(a) Freedom of movement on the whole national territory;

(b) Freedom to fix one's domicile in any place of the national territory;

(c) Freedom to expatriate, either temporarily or permanently, and to re-enter the national territory.

126. Restrictions on such right are envisaged, first of all, in laws, regulations and orders in road traffic matters imposing prohibitions to stop, park, transit or enter given places. Similarly, for public security reasons, according to the regulation on driving licences for motor vehicles, only individuals having passed the relevant examination are allowed to drive such vehicles (Law No. 106 of 20 September 1985).

127. Derogations from the right of establishment are envisaged in the provisions concerning foreigners. The small size of the State, the absence of controls at national borders, and the need to protect San Marino people have always led the San Marino legislator to limit the possibility for foreigners to stay on the territory of the Republic.

128. Law No. 23 of 4 August 1927, amended by Law No. 22 of 24 February 2000, stipulates that any foreigner may freely enter and move within the national territory. However, for those wishing to dwell in the Republic, a stay permit is required. Hotel keepers, house owners and renters accommodating a foreigner, even for one night only, are required to report to the gendarmerie. Law No. 95 of 4 September 1997 and subsequent implementing rules amended past provisions on the granting of stay and residence permits to foreigners. Stay permits are granted under special circumstances ranging from business or professional relations, to study, treatment or assistance needs, family reasons, tourism and religion. Permanent residence permits are issued by the gendarmerie to foreigners having been granted an ordinary or special stay permit for at least five years, provided that there have been no interruptions and that the applicant is not involved in any criminal proceedings for felonies, has not been convicted of any such felonies, and there are no major public security reasons.

129. With regard to the spouse of a San Marino citizen and children of majority age living with them, the five-year period is reduced to three. Minor children of foreign residents, born outside San Marino, are granted residence permits by the gendarmerie upon request.

130. Pending criminal proceedings, convictions for serious crimes, as well as major public security reasons are reasons for rejection or revocation of stay or residence permits. Under Law No. 22 of 24 February 2000, the police authorities can also order a foreigner without a residence or stay permit to leave the country immediately or within a reasonable period of time if reasons of crime prevention, security or public order so require.

131. Such measure shall be notified to the Law Commissioner, who, if circumstances so require, confirms it within the following 96 hours. Such measure can be appealed against within 10 days before the Administrative Judge of Appeal.

132. The expulsion of foreigners from the national territory is a security measure envisaged by article 127 of the Criminal Code and is applied by the judge upon conviction or acquittal. Article 14 of Law No. 9 of 2 February 1994 includes among measures of personal coercion the obligation or the prohibition to stay on the national territory or on part of it, as well as the prohibition to expatriate. Such precautionary measures are adopted by the Investigating Judge in the light of appropriate and serious indications of guilt, provided that there is a risk of withholding of evidence or a serious need to protect the community.

133. These measures can be appealed against before the Judge of Criminal Appeal. It should also be noted that expatriation is subject to the issuance of a passport by the Captains Regent and the Secretary of State for Foreign Affairs to citizens and stateless residents (article 1 of Law No. 85 of 27 September 1984: annex 16). Passports cannot be issued to:

(a) Anyone who has received an arrest warrant or a writ of summons for pending criminal proceedings concerning an offence punishable with at least one year's imprisonment;

(b) A person whose spouse has deposed in court a refusal for just reasons;

(c) Minors without the consent of the person having parental authority or guardianship;

(d) Anyone interdicted or disqualified (article 3 of Law No. 85/1984).

Right to freedom of assembly

134. Assembly means the temporary and voluntary meeting of people in a given place, following a prior agreement and for a specific purpose. As a consequence, assembly differs from assemblage which is determined by a sudden and unexpected event and therefore occasional. The assembly may have various purposes - religious, political, cultural, etc. - and may be either public or private. The only limitations are that participants in the assembly meet peacefully and unarmed.

135. Public assemblies shall be authorized by the Police Authorities, who may prohibit them if circumstances are liable to cause accidents and disorders. Unauthorized assemblies and assemblages, as well as authorized ones when causing disorders or criminal acts, may be dismissed by the police. Article 291 of the Criminal Code punishes any participant in an

assembly or assemblage in a public place or in a place open to the public not obeying a lawful dismissal order imparted by the authority because of imminent disorders or committed crimes endangering public order and security.

136. Special provisions regulate canvassing during the 30 days preceding a general election. Article 8 of Law No. 36 of 14 March 1997 stipulates, in this regard, that any canvass or meeting in a public place or a place open to the public shall be notified to the gendarmerie headquarters by the party delegate or his/her substitute at least 24 hours before the gathering, with indication of time and place. Failing such notification, the canvass may be prohibited. The notification is required to enable the police forces to best perform their duties in preventing disorders and criminal acts. Article 398 of the Criminal Code punishes anyone preventing or disturbing canvasses or other electoral meetings.

Right to freedom of association

137. Association differs from assembly in that it is characterized by a permanent establishment and the existence of a binding relation among its members, who pool their efforts to achieve an objective. The San Marino legal system fully guarantees freedom of association. The law only prohibits conspiracy (article 287 of the Criminal Code), the formation of military corps (article 288 of the Criminal Code), subversive associations (article 339 of the Criminal Code) and any association aiming at reorganizing, in any form, the fascist party (Law No. 24 of 29 August 1950: annex 17).

Right to freedom of thought

138. The right to freedom of thought means that anyone can publicly express his/her thoughts orally, or by means such as press, cinema, radio, billboards, images, graffiti, etc. In its broadest sense, the right to freedom of thought also encompasses:

(a) The right to report information, i.e. the right to report news and other people's thoughts, the responsibility for which remains with the person expressing the thought and not reporting it;

(b) The right to express views and comments, to criticize, appreciate, assume and evaluate in relation to certain facts and news;

(c) The right to propaganda, that is to spread and promote ideas and ideologies to win over supporters.

139. The only restriction envisaged by the Declaration on Citizens' Rights is the need to preserve public order and safeguard the interests of the community. However, the other constraints on the freedom of thought derive from the protection of subjective rights of individuals (right to confidentiality and reputation) and compliance with public duties (public decency, official secrets, loyalty to the State institutions, prohibition to aid and abet). Among the limitations deriving from the subjective rights of individuals is, first of all, the right to

confidentiality, i.e. prohibiting facts and aspects of the private life of an individual or his/her family from being unduly disclosed. The right to confidentiality also includes the protection of the freedom and secrecy of communications in any form.

140. Confidentiality is fully safeguarded by the San Marino legal system; hence, the law sets forth some restrictions on the freedom of thought. It must be stressed that the secrecy of communication is in no way restricted, as even wire-tapping upon authorization of the judicial authority is not allowed. Article 190 of the Criminal Code punishes any unauthorized person who, fraudulently learning the content of a communication, reveals it or prevents its transmission in any way, while article 191 punishes anyone who, having fraudulently learnt the content of confidential public or private acts or documents reveals or uses it to his/her or other people's advantage.

141. Similarly, the law regulated the setting up of databases, setting forth the right to rectification and regulating access for privacy protection purposes. Law No. 70 of 23 May 1995 (annex 18) regulated the computerized collection of personal data. Article 2 of said Law stipulates that the setting up or use by anyone of electronic or computerized files containing names and specific information related to legal entities shall primarily go to the benefit of all citizens. Therefore, such databases shall not prejudice, in any way, the respect for human rights and fundamental private or public freedoms, nor injure the dignity and identity of a person, whose private life is inviolable.

142. The setting up of private databases is subject to the authorization of the Congress of State and the Guarantor for the confidentiality of personal data, appointed among the administrative judges (arts. 6 and 15), while databases of the State and public entities are established by Regency Decree, having heard the opinion of the Guarantor (art. 5). Any physical or legal person has the right to know and challenge, for rectification, the data and information collected, processed and used electronically against or concerning such person.

143. Any entity or person collecting, processing or using personal data is subject to professional secrecy and is obliged to adopt any measure necessary to preserve the security and confidentiality of communications and to prevent the same being distorted or disclosed to unauthorized people. The disclosure of personal data is allowed with the consent of the interested party (art. 4). The collection, processing and use of personal data pertaining to the private life of an individual are always prohibited (art. 7). The infringement of these provisions is a criminal offence (art. 17).

144. The right to reputation is the right of a citizen not to be injured in his/her honour, dignity and estimation in which he/she is held by the community. Indeed, the law criminalizes libel and defamation, for which an action can be brought by the injured party.

145. Article 183 of the Criminal Code punishes anyone who in a public meeting or in communicating with other people ascribes to an individual, present or absent, a fact which injures his/her honour; article 185 envisages a more severe punishment if such offence is committed by using "social communications", even abroad. Pursuant to article 149 of the Criminal Code "social communications" mean "the reproduction or representation of thought,

information, actions or things done for public communication or dissemination through the press, tapes or records, radio, television, wire broadcasting, public performances or entertainment, cinema or other similar media. The author of such offences has the right to give proof of what he/she says in the following cases:

(a) If the injured party gives formal consent;

(b) In the presence of a criminal proceeding;

(c) If the establishment of the facts is of public interest, on account of the position of the injured party or for other reasons (art. 189).

146. The right to reputation must in any case be balanced with the right to report information and therefore, though the interested party may not wish facts injuring his/her reputation to be disclosed, the right to report information may be exercised when the information is true, of public interest and objective. Article 184 of the Criminal Code punishes anyone who, in a public meeting or in communicating with other people, injures the honour of a person, present or absent. If the fact is committed only in the presence of the injured party, the punishment is reduced.

147. Limitations on the freedom of thought deriving from the performing of public duties include, first of all, the protection of public decency. As a consequence, manifestations and images contrary to public decency, based on the average perception of the community, are prohibited. Article 275 of the Criminal Code punishes anyone who publicly and also through social communications commits obscene acts; article 276 punishes anyone who, through social communications directed to the public at large, represents actions or things which, especially in respect of minors, may incite to violence, cruelty, hooliganism and sexual corruption or may offend the sentiment of family cohesion. Similarly, acts contrary to decency in public places, or places open to the public, or the description, illustration, representation or reproduction of such acts through social communications are crimes (article 282 of the Criminal Code).

148. Another limitation to the freedom of thought is the need to safeguard secrecy. Therefore, the law criminalizes the disclosure of facts which have to remain secret. Articles 329 and 328 of the Criminal Code punish, respectively, the disclosure of political secrets and espionage. Article 378 punishes the disclosure of official secrets proper to the functioning of the public administration. Article 192 punishes the disclosure of professional, scientific or industrial secrets. Similarly, aiding and abetting is prohibited by article 289. A more sev_re punishment is envisaged if such fact takes place through social communications. As for loyalty to the institutions of the State and people representing them, the Criminal Code punishes libel against the Republic and its emblems (art. 338), offences against representatives of foreign States (art. 335), against the honour of the Captains Regent (art. 342), against the honour of people vested with public authority (art. 344) and against public officers (art. 382).

149. As the press is one of the most important media, freedom of the press is subject to the same restrictions applying to freedom of thought. The 28 May 1881 Law - partially superseded by the Criminal Code that entered into force on 1 January 1975 as regards the definition of crimes and the relevant criminal procedure - regulated the freedom of thought manifested

through the press. In this regard, printers and reproducers of signs or figures illustrating thoughts are required to give the Law Commissioner the first copy of any printed material. Anyone wishing to issue a periodical or other numbered publication is required to submit to the Secretariat of State for Internal Affairs a written statement indicating the name of the publisher, the editor, the nature of the publication and the name of the printing house. The editor shall transmit a specimen to the Law Commissioner.

150. The law also guarantees the right to rectification by imposing on editors the obligation to report the replies or declarations by the people indicated in their publications. From these provisions it emerges that publication by means of the press is not subject to licensing under the San Marino legal system, except for the duty for publishers to inform the administrative authority of the start of the activity and the duty for authors and editors to transmit a specimen to the judicial authority, in order to enable it to suppress any crime committed through the press.

151. With regard to radio broadcasting, only recently has the Republic regained its right to operate a public service of its own, following a bilateral agreement with Italy. Such right is exercised in monopoly regime by the company holding the concession. Indeed, Law No. 41 of 27 April 1989 (annex 19) established the San Marino Broadcasting Company as the sole agent authorized to exercise the right of the Republic to operate a radio and television broadcasting service, with the obligation to authorize the granting of the concession to a corporation regulated by San Marino law.

152. Article 13 of the above-mentioned Law sets forth that the radio and television services shall be operated in full respect for the principles of complete, objective and impartial information, with regard to both domestic and international facts and events. In compliance with the principles of public order, of the laws of the Republic, of the treaties stipulated with other States, of the conventions to which San Marino is a party and of its traditional neutrality, radio and television public services shall serve the following purposes:

(a) To stimulate the democratic conscience and the active participation of citizens, as an expression of the fundamental rights to freedom, life and full development of the country;

(b) To disseminate information and news on the Republic, on its events and activities, taking into consideration the relations with the surrounding regions;

(c) To increase knowledge of San Marino in Europe and globally and to promote its identity and historical and cultural heritage;

(d) To foster participation in the cultural debate on current major issues, such as enhanced education of the young, promotion of human rights and peace among peoples, equal dignity of States, environmental protection and international cooperation and solidarity;

(e) To increase awareness on European issues;

(f) To broadcast sports events, as well as entertainment programmes.

153. The Supervisory Commission established by article 14 is composed of seven members appointed by the Great and General Council in proportion to the political representation in Parliament. The Commission supervises the compliance of the radio and television services with the principles and purposes sanctioned by the law. In case of non-compliance, the Commission shall report to the Board of Directors of the San Marino Broadcasting Company, which will take the appropriate measures, except for those cases falling within the ordinary or administrative jurisdiction.

Right to freedom of religion

154. This right means that all citizens are free to profess any religion, either alone or in community with others and in public or private. Only religious rites contrary to public decency are prohibited. The Republic of San Marino fully guarantees freedom of religion, which is protected by the Criminal Code. Article 260 criminalizes the profanation of the symbols of a religion that are not contrary to public decency and of objects of worship, and the denigration of acts of worship; article 261 punishes anyone preventing a person, by means of force or threat, from professing his/her religion, from disseminating it or from participating in public or private ceremonies; article 262 punishes anyone impeding or disturbing rites, ceremonies and processions taking place in the presence of a religious minister.

Right to confidentiality of communications

155. In the Republic of San Marino, the confidentiality of communications is fully protected by criminal rules. Currently, there are no law provisions which allow limitations to the freedom of thought for reasons of public order or interest. In this regard, it must be stressed that listening to and recording phone conversations are not allowed, even upon authorization by the judicial authority. Similarly, San Marino legislation does not envisage any limitation to the confidentiality of correspondence deriving from particular personal status, not even in case of bankruptcy.

D. Incorporation into domestic legislation of rules contained in human rights international instruments

156. As a rule, all international treaties and conventions signed by the government authority and ratified by the Great and General Council are incorporated into domestic legislation. Such rules become applicable by virtue of the execution order contained in the ratification law. The execution order is not issued to regulate specific legal relationships, but only to adjust the domestic legal system to international obligations.

157. Such procedure is not applied in certain cases. For example, article 1 of the Declaration on Citizens' Rights which reads: "The Republic receives the rules of general international law as an integral part of its constitutional order, rejects war as a means to settle disputes between States, adheres to the international conventions on human rights and freedoms and reasserts the right to political asylum." According to this constitutional provision, the rules of general international law and the provisions of international conventions in the field of human rights and freedoms automatically form an integral part of domestic legislation and do not need a parliamentary execution order to become directly and immediately applicable.

158. In line with the above, the provisions of international instruments concerning human rights and freedoms can be directly invoked before the judicial bodies and applied by such bodies without the need to be incorporated into domestic legislation by virtue of laws or regulations, on account of their constitutional and imperative nature.

159. Besides article 1 of the Declaration on Citizens' Rights, such principles are further confirmed and strengthened by an express reference to judges in article 16 of the Declaration, according to which "judges shall comply with the principles of this Declaration in the interpretation and application of the law". Since the Republic of San Marino recognizes the inviolability of human rights and is party to international conventions on human rights and freedoms, judges are required to strictly apply the conventional rules safeguarding such rights and freedoms. In other words, under this constitutional provision, judges have the obligation to take into consideration also treaties in human rights matters, even if not entered into, by attributing to them formal effect. Therefore, such provisions can be directly invoked by any interested party. But even if they are not invoked, the ordinary courts and administrative tribunals are obliged to implement them as appropriate since they already form an integral part of the domestic legislation, formally and immediately.

160. To sum up, the San Marino legislator has so guaranteed the respect for the fundamental principles of the constitutional system, avoiding conflicting legislative acts or case law interpretations and also providing for a procedure to verify the legitimacy of ordinary provisions in relation to those enshrined in the Declaration on Citizens' Rights. Clearly, such a mechanism of constitutional guarantee could be used, where necessary, to repeal domestic law provisions in conflict with those of general international law or the human rights conventions.

161. As already mentioned in section A, in San Marino both ordinary courts and administrative tribunals are competent for human rights issues. As indicated in the reporting guidelines, the texts of the laws mentioned in this report have been submitted along with the report.

List of annexes

Leges Statutae Reipublicae Sancti Marini of the XVII century: Sections XIII and XXXI of Book I (annex 13)

Code of Criminal Procedure of 1878 (annex 5)

Law No. 13 of 5 June 1923: competences of the Council of the XII (annex 8)

Law No. 24 of 29 August 1950: prohibition of reorganization of the fascist party (annex 17)

Law No. 45 of 28 October 1970: provisions regulating stop and hold of people by the police (annex 15)

Law No. 17 of 25 February 1974: criminal code (annex 4)

Law No. 86 of 11 December 1974: rules amending criminal procedure (annex 6)

Law No. 59 of 8 July 1974: Declaration on citizens' rights (annex 1)

Law No. 23 of 11 March 1981: protection of trade union rights (annex 11)

Law No. 85 of 27 September 1984: provisions on passports (annex 16)

Law No. 49 of 26 April 1986: reform of the family law (annex 10)

Law No. 4 of 19 January 1989: constitutional legitimacy verification procedure (annex 14)

Law No. 41 of 27 April 1989: establishment of San Marino Broadcasting Company (annex 19)

Law No. 68 of 28 June 1989: administrative justice (annex 3)

Law No. 83 of 28 October 1992: judicial system (annex 2)

Law No. 9 of 2 February 1994: amendments to the criminal code and code of criminal procedure (annex 7)

Law No. 55 of 17 June 1994: civil procedure (annex 9)

Law No. 70 of 23 May 1995: provisions on databases (annex 18)

Law No. 81 of 14 June 1995: provisions on *restitutio in integrum* and *querela nullitatis* (annex 12)